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of Appeals case which has approved it, and that does give me some concern. And so I am going to do something that I don't often do, but in so doing, I think I'm being -- I think I'm facing the ruling as I see it. I think it's admissible, but I'm not sure. Out of an abundance of precaution, because I don't want to take the chance, I am ruling that this witness may not give his expert opinion a to causal relation between the footprint or sock print and the defendant.

However, what we're dealing with here is physical evidence found at the scene of the crime. And as to your so-called phase one level, I rule against you, and I rule that the witness may in effect tell the jury that which he told me on the stand out of the presence of the jury with the exception of the fact that he may not state any expert opinions on the subject. That's my ruling.

Now, we will come back at 9:30 tomorrow morning, and I hope that we will be ready to start with the prosecution's evidence as

judging the materiality of trial counsel's, all such counsel failures, including some that may not alone have been sufficient to cause a reasonable probability of a different outcome are to be included. For example, Petitioner noted in his opening brief, at 3, the failure of trial counsel to obtain and put on readily available expert testimony (that the state's bloody footprints and sneaker prints could not have been made by a person with the foot size of Jens Soering, see Affidavit of Russell Johnson, retired from New Jersey Bureau of Criminal Investigation, A.359-363; Affidavit of Harvey Van Hoven, forensic chemist with City of Rochester, A.364-69; Affidavit of retired FBI Special Agent Frederick Webb, A.375-378). The District Court rejected this argument on the incorrect premise that the trial court had ruled that no expert testimony would be admitted on this issue. A.1571. In fact, what the trial court held was that the state's witness was not an expert testimony because his training and experience was in tire treads impressions, not foot or shoe prints. Trans.6/40/90 at 672-74. Thus the District Court's assumption that the defense could only have put on lay testimony is incorrect. There were true experts (see A.359-69; 375-78) who could have testified with authority that the state witness' "correspondences" and plastic overlays were hogwash, and that in fact the footprints and shoe prints were not consistent with the size of Soering's foot, and that they in no way eliminated Elizabeth

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(PHOTOGRAPHS MARKED AS COMMONWEALTH'S
EXHIBITS 339 - 348.)

Q And Your Honor, may Mr. Hallett step down in front of the jury and use these?

THE COURT: Certainly.

Q And Mr. Hallett, if you'd put them in the order which you need them, my only request would be as you refer to them, if you would designate the Commonwealth's Exhibit Number for us. And I don't know whether this will help us or get in the way, but let's try it as we go through and see if it will help, if not, they'll move it out of the way for us. If you would just begin in your own fashion to describe what you did with the comparison of these known foot impressions to the photograph that we have been talking about as LR-3.

THE COURT: Before you start, Mr. Hallett, I want you to state facts and not opinions, sir, you understand?

A Yes, sir, I do.

I identified first what has been referred to as LR-3, the impression which was in question and located at the crime scene. The white object next to the impression is the ruler that the investigator placed next to the impression he found prior to taking the photograph. By using the ruler as a guide, the photograph could be

1 enlarged so that the impression would be a true and
2 accurate representation of what he saw at the time. This
3 is a true and accurate photograph of the size of that
4 impression.

5 Examination involving a bare foot is to
6 first of all, identify it as likely being a barefoot
7 impression and not something else that could accidentally
8 have made such an impression. The presence of five toes
9 was observed during my examination, as well as what we
10 would refer to as the ball of the foot or a metatarsal
11 pad, the arch area, the third area that I would examine,
12 and finally the heel area. During the examination, I
13 observed that the heel area had some distortion, there
14 appeared to have been a slide in the heel before it came
15 to rest.

16 Also surrounding portions of the impression
17 appear to be a design consistent with a sock covering.
18 Generally on the lateral side, or the outside away from
19 the big toe in the fourth toe area and on that lateral
20 side I can find a design where my fingers are placed.
21 There is also an absence of what I call dermal ridge, the
22 creased lines, identifying features of the foot. I did
23 put it that it was probably a barefoot impression with a
24 sock covering on it.

25 The distortion involved in this particular

1 photograph was at the heel area, where I thought there was
2 a slide, and what appears to be a smearing or sliding
3 involving some of the toes. However, the outline of the
4 impression in the arch area of the ball and the presence
5 of the five toes was clear.

6 One of the impressions from Jens Soering's
7 walking impression was selected as a demonstration purpose
8 here. This foot impression was made in ink, it involved
9 the bare foot of Jens Soering. I again examined it for
10 its clarity, the presence of all of the toes that there
11 hadn't been an accidental move. There was a double
12 impression at the heel.

13 MR. NEATON: I would object to that, to
14 an opinion.

15 THE WITNESS: No, sir, it's not an
16 opinion, I have other ones that I --

17 MR. UPDIKE: If I might, Your Honor,
18 respond, he is just describing -- . I could
19 rephrase the question in terms of if he
20 could point where there is the indications
21 of the end of the foot.

22 THE COURT: Let's try that.

23 MR. UPDIKE: Okay.

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1 BY MR. UPDIKE: (continuing)

2 Q Did you understand my question?

3 A Yes, I understand it. The end of the heel
4 was clear where my thumb is placed, and that I presumed in
5 my examination that this was the end of the heel.

6 Q All right, please continue.

7 A Both impressions had clear form features
8 about them. To use the word morphology simply means form.
9 By examining the form of this foot and the LR-3
10 impression, I could not make an elimination at this point
11 that this foot could not have made that impression.

12 I had to prepare a transparency. Since the
13 method of this type of examination relies principally upon
14 an overlay system, that is where a transparency of the
15 print of one foot of the suspect is superimposed over the
16 questioned impression. I placed a piece of white paper so
17 that you can see the transparency. It is a true and
18 accurate print of Jens Soering's foot that I have
19 previously described, Commonwealth's Exhibit 348.

20 The red arrows that appear on this
21 transparency are mine, I placed them there. They are
22 simply to draw my own attention to points, since this
23 became a work sheet of mine, that I wanted to remember.
24 Beginning with the toes, this simply says to me, this is
25 the big toe, the first arrow, and each of the subsequent

11

1 arrows for the lateral toes. In the space between the
 2 toes and the metatarsal pad, I have placed arrows again to
 3 show the irregular feature to myself to remember it,
 4 noting a bump, small plateau, or what I refer to as a
 5 plateau, each side of it, notches next to the big toe, the
 6 roundness of this medial side of the metatarsal pad, the
 7 sharp diagonal in the line or the imprint of this
 8 particular impression, a small delta, two notches where
 9 the arch begins to the metatarsal pad, and the same
 10 features in the heel; find this point, and the ends of
 11 what I accepted as the end of that impression, that's what
 12 each of the red arrows meant to me.

13 I then independently, and in this case I am
 14 using a black and white photograph, which was all that was
 15 available to me at the time I made this, the laboratory
 16 did not have color capability. Again, the red arrows were
 17 simply my indications to me of where I saw the concave
 18 feature of the arch area, the small delta I referred to,
 19 notches where the metatarsal begins to the arch, the sharp
 20 diagonal in the ball of the foot, the presence of each of
 21 the toes, the notation of a small point between the fourth
 22 and fifth toe, and the delta in the forward edge or
 23 anterior side of the metatarsal pad.

24 I then placed the transparency of Jens
 25 Soering's foot for the presence of each of the toes, the

1 space between the first toe or the large toe and the
2 second toe, the location of each of the toes to ascertain
3 that they were in fact there.

4 Subsequently I was able to obtain color
5 photographs of the LR-3 , and I did essentially the same
6 thing, looking for the bump as I referred to it on this
7 part of the metatarsal pad, the delta in the forward or
8 the middle part of the metatarsal pad, the presence of the
9 toes with the space between the first and the second, the
10 close proximity of the second and third, and somewhat of a
11 space between the last toe. The diagonal of the ball
12 again featured. I then superimposed Mr. Soering's
13 impression to find each of the features which I have
14 previously identified on the red arrows.

15 Subsequently, I was asked to compare the
16 LR-3 impression with three other inked foot impressions.
17 The first that I am holding up is the foot impression of
18 Elizabeth Haysom, of her right foot. I again looked for
19 the same features that I have previously identified with
20 red arrows. I looked for the plateaued area, presence of
21 a bump as I referred to it in the metatarsal pad, the wide
22 space between the large toe and the second toe, and a
23 smaller space in the remaining toes. I looked also for
24 the diagonal of the ball of the foot, the presence of a
25 delta, for the concaveness, apparent in the LR-3

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2 second toe, the location of each of the toes to ascertain
3 that they were in fact there.

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5 photographs of the LR-3 , and I did essentially the same
6 thing, looking for the bump as I referred to it on this
7 part of the metatarsal pad, the delta in the forward or
8 the middle part of the metatarsal pad, the presence of the
9 toes with the space between the first and the second, the
10 close proximity of the second and third, and somewhat of a
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20 red arrows. I looked for the plateaued area, presence of
21 a bump as I referred to it in the metatarsal pad, the wide
22 space between the large toe and the second toe, and a
23 smaller space in the remaining toes. I looked also for
24 the diagonal of the ball of the foot, the presence of a
25 delta, for the concaveness, apparent in the LR-3

1 impression, and the shape of the heel.

12

2 The next impression I received was that of
3 Fontaine Harris. Again, I went through the same process,
4 accounting for the toes, the location of the toes, some
5 space between the large toe and the second toe and a much
6 smaller space between the others. Some location or
7 indication of the bump in the location that I have
8 referred to, or the delta in the forward portion of the
9 ball. The angular side of the ball of the foot, the
10 presence of the delta where the metatarsal and the arch
11 come together.

12 And finally, the impression of Julian
13 Haysom, the same procedure, again look looking for the
14 features that I found in the LR-3 impression as I did when
15 I compared Jens Soering's impression with the LR-3, the
16 spacing of the toes, the length of the impression, the
17 width of the impression, the significant contoured area,
18 concave area of the arch. I then prepared, as I did in
19 the first, transparencies of each of the three subsequent
20 inked impressions over the LR-3 impression. The first
21 impression was that of Fontaine Harris, I looked to see
22 for any superimposing of the inked impression and the LR-3
23 impression below it.

24 The next impression of Elizabeth Haysom, I
25 looked at the forward edge of the metatarsal pad for the

1 presence of the plateaued area, the presence of some bump
2 which may have referred to on that portion, the location
3 and placement of the toes by lifting it up and putting it
4 down, I could see if there was any superimposing.

5 The final impression that I compared was
6 that of Julian Haysom, again looking for the presence of
7 the toes being in their proper location, the superimpose
8 over the toes of the LR-3 impression. Some indication of
9 a plateau or bump of area on the metatarsal pad, some kind
10 of diagonal in the ball area, the concaveness of the arch
11 area, and whether they did superimpose.

12 Q Now as to the LR-3 itself, can you describe
13 the action and function of the foot as it comes across a
14 slippery substance of some sort, particularly on a
15 hardwood floor such as we have here, what does the foot
16 do, how does it respond, what are the functions of it?

17 MR. NEATON: I am going to object, it
18 calls for an opinion.

19 THE COURT: Sustained. Sustained,
20 that's opinion, he's not been qualified as
21 an expert. Objection sustained, sir.

22 MR. UPDIKE: I hadn't said anything,
23 Your Honor, just trying to think at this
24 point.

25 All right, Mr. Hallett. I have no

1 further questions at this point. If you
2 would resume the stand, and I'll get this
3 out of the way, and if you'd please answer
4 any questions counsel may have.
5

6 CROSS EXAMINATION

7 BY MR. NEATON:

8 Q Mr. Hallett, you said that you didn't know
9 Julian Haysom, Elizabeth Haysom or Fontaine Harris
10 personally, I just want to clear something up, do you know
11 my client personally?

12 A I don't know any of the comparisons
13 personally, no.

14 Q You took the sample of Elizabeth Haysom's
15 footprints from the roll of paper that they were on, is
16 that correct?

17 A Yes, I did.

18 Q And did you have any sock covered
19 impressions of Elizabeth Haysom's foot to compare with
20 what has been called the LR-3 print?

21 A No, sir.

22 Q Did you have any sock covered footprints of
23 Julian Haysom or Fontaine Harris to compare?

24 A No, sir, I did not.

25 Q Did you have sock covered foot impressions

1 of Jens Soering to compare with the LR-3?

2 A Yes, I did.

3 Q You did not use a sock covered foot.

4 impression of Jens Soering to compare with the LR-3, did
5 you?

6 A No, I did not.

7 Q Now in terms of Elizabeth Haysom's footprint
8 that you chose, and it's among this mess down here, I have
9 no idea what the number of this Commonwealth's Exhibit is,
10 Judge.

11 MR. CLEVELAND: Detective Gardner
12 would be able to tell you.

13 MR. UPDIKE: Be happy to tell you what
14 you'd like to see, and we'll see if we can
15 find it for you.

16 MR. NEATON: I know what I want to
17 see, I just don't know the number of it.

18 Ricky, you can give me some help?

19 MR. UPDIKE: If you want us to help you
20 we'll be happy to, if you want to find it,
21 you can find it.

22
23 BY MR. NEATON: (continuing)

24 Q Mr. Hallett, could you step down and point
25 to the foot print of Elizabeth Haysom that you used for

3

1 comparison purposes?

2 THE COURT: Let's identify that, is
3 that 39?

4 Q 39, thank you. In fact you used this
5 footprint here, is that correct, your X right there, is
6 that the ones you used to compare with Elizabeth Haysom?

7 A Yes, sir.

8 Q And that's the only one you didn't use, is
9 that right, or that's the only one you used.

10 A Well I examined all of them, but that's the
11 only one I had a transparency made of.

12 Q To show the jury today?

13 A Yes.

14 Q Now -- thanks, Ricky. You can resume the
15 stand, Mr. Hallett. In other words, there were what, four
16 or five other right foot impressions of Elizabeth Haysom
17 that you did not choose from that sample?

18 A There may have been that many, yes, sir.

19 Q Now I believe you said that when you were
20 observing the LR-3, one of the things that you looked to
21 was the distance between the first toe and the second toe
22 on LR-3, is that right?

23 A That was one area I looked at, yes.

24 Q And then you looked at the close proximity
25 of the second and third toe on LR-3, that's one of the

1 things that you looked at?

2 A Yes, sir.

3 Q Now one of the things in showing this to the
4 jury, you pointed out where the toes were, and they can
5 pull up the transparency and look at where the toes line
6 up with this one, right?

7 A Yes, sir, they can.

8 Q This footprint of Elizabeth Haysom is
9 approximately the same length as the LR-3, right?

10 A Well, you can look at it.

11 MR. UPDIKE: Objection, Your Honor.

12 Q You can look at it. I'll withdraw the
13 question, Judge.

14 THE COURT: Question withdrawn.

15 Q Now I have this little ruler here, you said
16 this is an exact reproduction of the size of Elizabeth
17 Haysom's foot on the transparency, it's life size?

18 A Yes, sir.

19 Q Would you take this ruler and put it over
20 the ruler on the photograph and tell me if the six inches
21 on the ruler line up with the six inches on my ruler?

22 A On the transparency, you want this measured?

23 Q Yes.

24 A Yes, sir, it does.

25 Q They do?